2003

State of Utah v. Ivan Larsen : Brief of Appellant

Utah Court of Appeals

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K. Andrew Fitzgerald; Office of the Public Defender; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,**	:	
vs.	:	**Case No. 20031033-CA**
IVAN LARSEN, **Defendant/Appellant.**	:	

OPENING BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND CONVICTION OF AGGRAVATED SEXUAL ABUSE OF A CHILD, A FIRST DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 76-5-404.1(3), IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, STATE OF UTAH, THE HONORABLE LYLE R. ANDERSON PRESIDING

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Defendant appeals a judgment and conviction of Aggravated Sexual Abuse of a Child, a First-Degree Felony, in violation of Utah Code Ann., § 76-5-404.1(3) and § 76-1-601, the Honorable Lyle R. Anderson presiding. Jurisdiction is proper both in this court as well as the Utah Supreme Court pursuant to Utah Code Ann. §§ 78-2a-3(2)(e) and 78-2a-3(2)(a) (2002). However this case was transferred to this Court under Utah Code Ann., § 78-2-2(4). [*See Addendum 1*].

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue: What is the standard of review concerning statements in opening and closing argument that were not objected to?

Standard of Review: the appellate standard of review is the plain error standard. *State v. Bradley*, 2002 UT App 348, ¶ 13, 57 P.3d 1139; *State v. Olsen*, 860 P.2d 332, 333-334 (1993). "To constitute plain error, three elements must be established: (i) an error did in fact occur; (ii) the error should have been obvious; and (iii) the error is

harmful. *State v. Bradley*, 2002 UT App 348, ¶ 41, 57 P.3d 1149; *State v. Olsen*, 860 P.2d 332, 334 (1993).

Issue: Did the Prosecutor commit prosecutorial misconduct when he told the jury that he believed that the evidence was overwhelming and made other first person statements, and referred to medical evidence that was never presented at during trial?

Standard of Review: The standard applicable to reviewing alleged prejudicial remarks of counsel is whether the remarks call the attention of the jurors to matters they would not be justified in considering in determining their verdict and whether the jurors were likely influences by the improper remarks in reaching their verdict. State v. Andreason, 718 P.2d 400 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are relevant to this appeal and reproduced in full in Addendum B:

UTAH CONST. ART. 1, § 12.

STATEMENT OF THE CASE

On April 1st, 2003, defendant was charged by information with Aggravated Sexual Abuse of a Child. Following a preliminary hearing the defendant was bound over for trial.

On October 2nd, 2003, a jury convicted the defendant of Aggravated Sexual Abuse of a Child. Tr. 150:11-13. On December 2nd, 2003, the defendant was sentenced five to life in prison, credit for time served in Grand County Jail, and restitution was left open. Defendant timely appealed.

STATEMENT OF FACTS

The Case of Prejudicial Prosecutorial Comments

During the first part of the year 2002, Amber Larsen ("Amber") told her mother, Barbara Butterfield ("Ms. Butterfield") some disturbing information. Tr. 55:15-19, 22. Amber told Barbara that Amber's father, Ivan Larsen ("Defendant"), had touched Amber in her private areas. Tr 56: 20-21. Subsequently, Amber was interviewed by Moab City Police Officer Edward Guerrero ("Officer Guerrero") on two separate occasions. Tr. 4-6. The first interview was on January 8th and the second on February 15th. Tr. 127 7-8.

In these interviews with Officer Guerrero, Amber revealed that Amber's father had touched her private parts or vaginal area while in the bathroom. Tr. 115:7-9. Also, Amber revealed that her father had put arrow shafts in her behind and into her vaginal area. Tr. 113:6-7. Amber described the arrow shafts as long stick with feathers on the end. Tr. 113:16-17.

During the second interview when Officer Guerrero asked Amber questions, Amber would change the answers back and forth. Tr. 121:1-2, 19-21. Officer Guerrero asked Amber whether Amber's father touched her private parts and Amber answered yes. Tr. 118:22-23. Officer Guerrero asked the same question again and Amber would answer no. Tr. 119:1-2. Later in the interview Officer Guerrero asked Amber whether Amber's father ever came to the bathroom with Amber. Tr. 120:14-16. Amber answered in the negative. Tr. 120:15-16.

At trial, Amber testified that her father is Charles and then testifies that Ivan Larsen is her father. Tr. 86:2-3, 6-13. Several questions later, Amber testified that her father touched Amber's vagina and bottom. Tr. 93:16-24. Shortly thereafter, Amber

testified that her father stuck arrows in Amber's bottom and vagina more than one time. Tr. 1-20.

At the close of the prosecution's case, Mr. Fitzgerald, the Defendant's attorney, moved for a directed verdict and asserted that the prosecution did not properly identify the defendant. Tr. 130:22-25. Mr. Fitzgerald also asserted that the evidence presented, Amber's contradicting statements as to whether Amber was improperly touched, was insufficient evidence for a jury to convict. Tr. 131:2-5. Judge Anderson denied the motion by stating:

> I understand one of those is a reasonable jury would have to acquit – have to have a reasonable doubt. I don't think that's the case. I think taking into consideration the way children are, they may very well, and appropriately, decide that they believe her and, ah – and, ah, although they certainly don't have to. And if they did, it would be reasonable for them to convict him.
>
> Um, on the other, the identification, I guess the most of the issue from not having pointed specifically at him, the most you have there is the question of whether we actually have the defendant present during the trial. But she clearly identified a person known as Ivan, who is her father. Her name is Amber Larsen. I think it's reasonable to infer Ivan Larsen is the person she was talking about. So I think we have an Ivan Larsen. Maybe not the person who's sitting here in the courtroom, but an Ivan Larsen, nonetheless, who's been identified by her. So if you really think that she's got the wrong Ivan Larsen, ah, you're welcome to make that point. But she doesn't have to point right at him and say, "That's the man, " unless she doesn't – know, if you don't know the name of someone, sometimes you have to point right at 'em. But if you know their name, then you don't have to refer to them, point at them.
>
> Tr. 131:6-25 & Tr 132:1-3.
>
> Later during the prosecution's closing argument, the prosecutor stated that
>
> in my opinion – and I guess everybody has a different opinion about what somebody says, but a mother who keeps track of a child knows when they're at the neighbor's house, knows who they're playing with, checks on 'em every half an hour or so is, to me, being fairly responsible. I don't think that Barbara Butterfield could have done anything, could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that."

Tr. 145:2-10.

A few moments later the prosecutor stated that "'Ah, counsel tried to get Mz. Butterfield to admit things. He said, "Now didn't – isn't this what she – isn't this what, ah, Amber said in this? Isn't this what she said?" That's not what I remember."' Tr. 12-15.

Further into the prosecutor's closing argument, the prosecutor addresses medical evidence.

> Medical evidence. Ladies and gentlemen, that's gonna come under the category that I said of some of these other things. Maybe you're wondering why there's no medical evidence. But – but if there are medical reports in that file that talk about this thing, it's just as easy for the defense to subpoena those witnesses as it is for the prosecution. If I don't feel that kind of evidence is gonna help you in our decision, then I don't subpoena that witness. Tr. 146:16-23.
>
> Now why would medical evidence possibly not help in a decision? If we have a Medical Examiner take a look at a little girl and they say, "We've examined this girl and we can't either affirm or preclude what her statements are. We can't say yes or no," then that doesn't really help you, does it? Get somebody down here from Salt Lake City to tell you, "We can't say yes or no," means you know what? Tr. 146:24-25 & 147:1-5.
>
> Let me make another point. If I get a rape victim that was raped yesterday and we have her examined, then what we have is things like cuts, bruises, swelling so forth. If this person was abused two weeks ago and they examined her, then maybe they say, "You know what? The opening's consistent with having been penetrated, but we can't – there's not bruising. We can't say that he did it. We can't say that it was done by an arrow. Tr. 147:6-13
>
> So why do they want you to think about medical evidence, ladies and gentlemen? And if we're gonna raise a reasonable doubt about that, ladies and gentlemen, it's supposed to be something more than fancy imagination or wholly speculative possibility. You don't have any medical evidence supports the fact that this girl wasn't abused. Tr. 147: 14-19.

Concluding the prosecutor's closing argument, the prosecutor states '"If you have had a doubt raised, you have to be able to say to yourself, "How is that – have I had some

kind of a doubt draw into this thing, based upon itself evidence that I heard?" I say that you haven't ladies and gentlemen."' Tr. 22-25.

And then the prosecutor concludes, "Ah, my belief is that the evidence in this case from Amber Larsen, from all of her statements, from her interviews is –overwhelming. The elements of this case have been met." Tr. 149:2-5.

SUMMARY OF ARGUMENT

Point 1: The prosecutor made statements in the opening and closing argument that constitute prosecutorial misconduct because the prosecutor called to the attention of the jury matters they would not be justified in considering in reaching a verdict.

Point 2: Under the particular circumstances of the case, the jurors were influenced by the improper remarks in reaching their verdict. Thus, the defendant's Constitutional right to an fair and impartial trial was violated. UTAH CONST. ART. 1, § 12.

ARGUMENT

1. THE PROSECUTOR'S COMMENTS IN THE OPENING AND CLOSING STATEMENT CONSTITUTE PROSECUTORIAL MISCONDUCT AND PREJUDICED THE JURY IN REACHING A VERDICT.

It is well settled law in Utah that when a statement is not properly objected to and preserved at the trial level, the appellate standard of review is the plain error standard. *State v. Bradley*, 2002 UT App 348, ¶ 13, 57 P.3d 1139; *State v. Olsen*, 860 P.2d 332, 333-334 (1993). "To constitute plain error, three elements must be established: (i) an error did in fact occur; (ii) the error should have been obvious; and (iii) the error is harmful. *State v. Bradley*, 2002 UT App 348, ¶ 41, 57 P.3d 1149; *State v. Olsen*, 860 P.2d 332, 334 (1993). Thus, because the prejudicial statements made by the prosecution

in the opening and closing statement were not objected to, the proper appellate standard of review is plain error.

The prosecutor's comments during opening and closing argument constitute prosecutorial misconduct.[1] The two-part test for prosecutorial misconduct is first, whether the prosecutor's remarks, "call the attention of the jurors to matters they would not be justified in considering in determining their verdict." *State v. Andreason*, 718 P.2d 400, 402 (1986). And second, whether "under the particular circumstances of this case, the jurors were probably influenced by the improper remarks in reaching their verdict." *Id*; *State v. Kohl*, 2000 UT 35, ¶ 22, 999 P.2d 7; *State v. Valdez*, 513 P.2d 422, 426 (1973).

First, the prosecutor's use of the term "I think" during the prosecutor's opening argument was improper and prejudicial. In *State v. Dibello*, 780 P.2d 1221, 1226 (1989), the court determined that "[t]he assertion of personal knowledge or opinion about the facts by counsel is improper" when the prosecutor repeatedly prefaced his statements with "I think." In comparison, the prosecutor in the case at issue stated that "I think our evidence is strong and will – and – you will be convinced and I will ask you to convict." Tr. 51 51:10-12. Hence, the prosecutor committed error when the prosecutor called to the attention of the jury his person knowledge and opinion in the form of "I think."[2]

Second, during the prosecutor's closing argument, the prosecutor stated that

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[1] Because there are numerous improper comments that the prosecutor made throughout the opening and closing argument, and for the sake of organization, the improper comments will be dealt with consecutively, as they occur, starting with opening argument and ending with the closing argument.

[2] "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *State v.* Dibello, 780 P.2d 1221, 1227(1980) *quoting* ABA Standards for Criminal Justice 3-5.8 (2nd ed. 1980)

> in my opinion – and I guess everybody has a different opinion about what somebody says, but a mother who keeps track of a child knows when they're at the neighbor's house, knows who they're playing with, checks on 'em every half an hour or so is, to me, being fairly responsible. I don't think that Barbara Butterfield could have done anything, could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that."
>
> Tr. 145:2-10.

Again, the prosecutor states expressions of opinion and personal knowledge when he states "in my opinion" and "I don't think." Tr. 145:2, 7. Furthermore, the terms "in my opinion . . . " and "I don't think . . . " preface the assertion by the prosecutor that the defendant committed sexual abuse of a child. "I don't think that Barbara Butterfield could have done anything, could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that." Tr. 145:7-10. In essence, the prosecutor's use of the terms "in my opinion" and "I don't think" directly asserts through personal knowledge that the defendant committed sexual abuse of a child. Therefore, the prosecutor's remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict . . ." *Valdez*, 513 P.2d at 426.

In addition, it is important to note that the improper comment is not an opinion on a fragment of evidence or a collateral fact of the case, but a direct conclusion that goes to the heart of the verdict, that "I don't think that Barbara Butterfield . . . could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that." Tr. 145:7-10. In essence, the prosecutor has improperly given his opinion that the defendant committed the crime. Thus, it is difficult to argue that this

statement did not influence the jury in its verdict, satisfying the second prong of the prosecutorial misconduct test.

Thirdly, a few moments later, the prosecutor makes additional improper comments by stating that 'Ah, counsel tried to get Mz. Butterfield to admit things. He said, "Now didn't – isn't this what she – isn't this what, ah, Amber said in this? Isn't this what she said?" That's not what I remember."' Tr. 145:12-15. Here, the prosecutor purportedly refers to cross examination of Ms. Barbara Butterfield (Tr. 65:23 to 81:8), Amber Larsen's biological mother, and dismisses the validity of the cross examination by stating "That's not what I remember." Tr. 145:15. Thus, the prosecution gives his personal opinion as to what was said by Ms. Barbara Butterfield and creates a false impression as to Mrs. Barbara Butterfield's testimony. The remedy for this statement can be found in *Walker v. State,* 624 P.2d 687, 691 (1981)(False impression of evidence that prosecution knowingly did not correct constitutes prosecutorial misconduct and influenced jury verdict depriving defendant of a fair trial).

Fourth, and further into the prosecutor's closing argument, the prosecutor improperly addresses medical evidence that was never introduced to the jury. In the well established case of *State v. Horr*, 221 P. 867, 877 (1923), "the district attorney in his closing argument made the statement that if the train had not been late . . . he would have had another witness to prove a certain controverted point." The Utah Supreme Court ruled that the defendant did not have a fair and impartial trial and elaborated on the district attorney's improper statement that suggested evidence that was never presented to the jury.

> Everyone must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the

> remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on a motion for a new trial.
>
> The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in the official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated.
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> *Id.* at 877.

Furthermore, the Court continues and quotes *Tucker v. Henniker*, 41 N.H. 317, at page 325.

> When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them.
>
> *Horr*, 221 P. at 877.

Thus, at length, the Court condemns the district attorney's reference to evidence that was not presented at trial.[3]

> In the case at hand, the prosecutor stated the following during closing argument.
>
> Medical evidence. Ladies and gentlemen, that's gonna come under the category that I said of some of these other things. Maybe you're wondering why there's no medical evidence. But – but if there are medical reports in that file that talk about this thing, it's just as easy for the defense to subpoena those witnesses as it is for the prosecution. If I don't feel that kind of evidence is gonna help you in our decision, then I don't subpoena that witness. Tr. 146:16-23.

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[3] The Court goes on to further address the improper statement. "For counsel to attempt surreptitiously to get before the jury, facts by way of supposition, which have not been proven, is highly reprehensible; and the practice should be instantly repressed by the court, without waiting to be called upon by the opposite party." *State v. Horr*, 221 P. 867, 877 (1923), quoting *Berry v. State of Georgia*, 10 Ga. 511.

> Now why would medical evidence possibly not help in a decision? If we have a Medical Examiner take a look at a little girl and they say, "We've examined this girl and we can't either affirm or preclude what her statements are. We can't say yes or no," then that doesn't really help you, does it? Get somebody down here from Salt Lake City to tell you, "We can't say yes or no," means you know what? Tr. 146:24-25 & 147:1-5.
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> Let me make another point. If I get a rape victim that was raped yesterday and we have her examined, then what we have is things like cuts, bruises, swelling so forth. If this person was abused two weeks ago and they examined her, then maybe they say, "You know what? The opening's consistent with having been penetrated, but we can't – there's not bruising. We can't say that he did it. We can't say that it was done by an arrow. Tr. 147:6-13
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> So why do they want you to think about medical evidence, ladies and gentlemen? And if we're gonna raise a reasonable doubt about that, ladies and gentlemen, it's supposed to be something more than fancy imagination or wholly speculative possibility. You don't have any medical evidence supports the fact that this girl wasn't abused. Tr. 147: 14-19.

On its face this statement is highly problematic considering that there never was medical evidence introduced during the trial. No doctors testified and no medical reports were presented to the court as exhibits. The record is completely absent of medical information or analysis that would allow the prosecutor to make the argument that was made. The statements "[y]ou don't have any medical evidence supports the fact that this girl wasn't abused," Tr. 147:18-19 and the statement, "Medical evidence. Ladies and gentlemen, that's gonna come under the category that I said of some of these other things. Maybe you're wondering why there's no medical evidence. But – but if there are medical reports in that file that talk about this thing . . . " Tr. 146:16-20, clearly places facts into the minds of the jury that have not been proven and prejudices the jury. Specifically, the prosecutor's arguments suggest medical evidence that would confirm the defendant's guilt. Thus, it is clear that the prosecutor called to the attention of the jury material that the jury would not be justified in considering in reaching its verdict.

Also, analysis of the second prong for prosecutorial misconduct, the *Horr* Court ruled that the prosecutorial impropriety influenced the jury and the defendant did not have a fair and impartial jury. *Horr*, 221 P. 877-878. Thus, it is likely that the statements concerning medical evidence that were never introduced to the jury influenced the verdict in the present case. In fact, the improper statements concerning medical evidence are arguably more prejudicial than the improper statement in *Horr* that warranted reversal due to the strong impressions of condemning medical evidence was never introduced to the jury. *again see Walker v. State,* 624 P.2d 687, 691 (1981)(False impression of evidence that prosecution knowingly did not correct constitutes prosecutorial misconduct and influenced jury verdict depriving defendant of a fair trial).

Fifth, concluding the prosecutor's closing argument, the prosecutor states "'If you have had a doubt raised, you have to be able to say to yourself, "How is that – have I had some kind of a doubt draw into this thing, based upon itself evidence that I heard?" I say that you haven't ladies and gentlemen.'" Tr. 22-25. Again, the prosecutor makes improper and prejudicial statements to the jury. In effect, the prosecutor gives personal opinion that there is not a reasonable doubt for the jury to consider.

Sixth, and finally, the prosecutor improperly concludes in the last sentences of his closing argument with his personal view as to the weight of the evidence. In *State v. Hopkins*, P.2d 475, 479 (1989), the prosecutor, during closing argument states that "The fact that this representative of the State is plainly impressed by the evidence is no call for you to be impressed by the evidence . . . It is impossible for me to convey in words in any capacity why the State is so impressed with the evidence in this case." *Id.* Based upon this statement, the Court reasoned that the prosecutor expressed his personal view of the

weight of the evidence and held that "the foregoing argument is clearly directed toward a matter the jury would not be justified in considering and thus was improper." *Id.* In the case at hand, the prosecutor states that "Ah, my belief is that the evidence in this case from Amber Larsen, from all of her statements, from her interviews is –overwhelming. The elements of this case have been met." Tr. 149:2-5. Thus, the prosecutor's personal belief of the weight of the evidence being "overwhelming" is similar to the *Hopkins* prosecutor's personal expression as to the weight of the evidence being "impressive" beyond words.[4] Therefore, it is clear that in the present case, the prosecutor called to attention of the jurors, matters which they would not be justified in considering in determining their verdict.[5]

Furthermore, considering the second prong of the test for prosecutorial misconduct, whether the improper statement influenced the jury's verdict, the *Hopkin's* Court decided that the improper statements were not enough to overturn the jury verdict because the improper statements were prefaced with a limiting instruction and other evidence in the case was strong. *Hopkins*, 782 P.2d at 480.

> At the outset of his comments, the prosecutor specifically advised the jury that what he had to say was not to be taken as evidence, and in later reiterating this point, he noted that each juror need make an individual assessment of the evidence, regardless of his view of the evidence, taken as a representative of the state.
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> *Hopkins*, 782 P.2d at 480.

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[4] It may also be argued that the term in the present case "overwhelming" is more improper than the term "impressive," and hence more prejudicial especially coupled with "my belief is that . . . " Tr. 149:2

[5] The *Hopkin's* Court elaborated further that "The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *State v. Hopkins*, 782 P.2d 475, 479-480 (1989) *quoting State v. Young*, 47 U.S. 1, S.Ct. 1038, 84 L.Ed.2d 1 (1985).

In contrast, in the present case, there is not a limiting instruction by the prosecutor before or after the improper comment and as will be argued later, the evidence in this case is not strong. Thus, the full effect of the improper comment, not softened by limiting argument, bares upon the jury and influences the jury in their verdict.

Thus, from the above analysis, there is no question that the prosecutor's opening and especially the closing argument are replete with improper and prejudicial statements that constitute prosecutorial misconduct. However, as dealt with above, the second prong of the test for prosecutorial misconduct is whether "under the particular circumstances of this case, the jurors were probably influenced by the improper remarks in reaching their verdict." *Id*; *State v. Kohl*, 2000 UT 35, ¶ 22, 999 P.2d 7; *State v. Valdez*, 513 P.2d 422, 426 (1973).[6] In addition, when weighing "the particular circumstances of the case, " Utah courts are more likely to find that prosecutorial misconduct influenced the jury when a case is close or the facts of the case doubtful. *State v. Horr*, 221 P. 867, 877 (1923); *State v. Andreason*, 718 P.2d 400, 403 (1986)(" If the proof of a defendant's guilt is strong, we will not presume the improper remark to be prejudicial. But in a case with less than compelling proof, we will more closely scrutinize the prosecutor's conduct").

The particular circumstances of the case at hand are that this is not a case with three witnesses testifying that they directly saw something happen. This is a case where two witnesses Barbara Butterfield and Officer Guerrero testify of what Amber Larsen said in two interviews and where one witness, Amber Larsen testifies directly. Furthermore, it should be remembered that Amber Larsen's testimony during the

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[6] The test has also been restated as "absent the improper argument, there was a reasonable likelihood of an outcome more favorable to defendant. *State v. Dibello*, 780 P.2d 1221,1225 (1989); *State v. Kohl*, 2000 UT 35, ¶ 22, 999 P.2d 7; *State v. Valdez*, 513 P.2d 422, 426 (1973).

interviews was contradictory. Tr. 121:1-2, 19-21. Officer Guerrero asked Amber whether Amber's father touched her private parts and Amber answered yes. Tr. 118:22-23. Officer Guerrero asked the same question again and Amber would answer no. Tr. 119:1-2. Later in the interview Officer Guerrero asked Amber whether Amber's father ever came to the bathroom with Amber. Tr. 120:14-16. Amber answered in the negative. Tr. 120:15-16. Thus, Amber stated that factual events happened and then she denied the same. Hence, the particular circumstances of the case are that the factual evidence is limited and the case on the facts becomes a close one where the jury has to rely solely on Amber Larsen's various testimonies.[7] Therefore, the prosecutorial misconduct in the form of improper statements in their various forms is much more likely to have influenced the jury's verdict because factually, the case is a close one, and the prosecutor's improper comments bridged the evidential gap that needed to be filled for the jury to reach a guilty verdict. Had that gap not been filled, the jury may have found the defendant not guilty.

CUMMULATIVE ERROR DOCTRINE

As discussed above, this court would be justified in finding that the defendant did not receive a fair and unbiased trial considering alone the improper statement concerning the medical evidence. This court may also make the same determination based solely upon the prosecutor's improper comment as to the weight of the evidence when the prosecutor stated that the evidence is "overwhelming." Tr. 149:5. However, this court may also consider the cumulative prejudice created by the entire string of improper

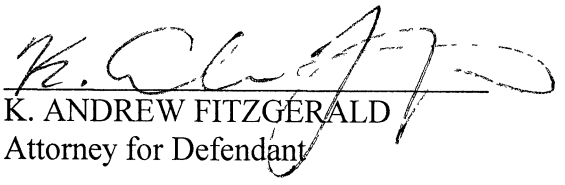
[7] At trial, Amber testified that her father is Charles and then testifies that Ivan Larsen is her father. Tr. 86:2-3, 6-13. This apparent lack of in-court identification is another example calling the facts of the case into dispute. Furthermore, Barbara Butterfield, testified that there were others in Amber's community that may have sexually abused Amber. Tr. 75:14-25, 76:1-25, 77:1-25. Again, testimony and facts that make this case factually borderline for the jury.

statements made by the prosecutor and conclude that the improprieties influenced the jury verdict. "Under the cumulative error doctrine, we will reverse only if 'the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had." *State v. Kohl*, 2000 UT 35 ¶ 25, 999 P.2d 7. Therefore, considering the numerous instances of prosecutorial misconduct dually with the limited factual basis, it is difficult to conclude or have confidence that the defendant had a fair and impartial trial. Thus, a reversal is warranted and is in line with the case law.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Defendant's conviction be reversed.

RESPECTFULLY SUBMITTED this 19th day of July, 2004.

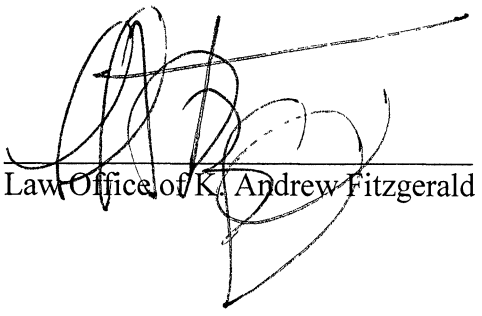


K. ANDREW FITZGERALD
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Opening Brief of Appellant were mailed, postage prepaid, this 19th day of July 2004 to:

J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854



Law Office of K. Andrew Fitzgerald

ADDENDUM 1

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

State of Utah,
Plaintiff and Appellee,

v.

No. 20031033-SC
0317-083

Ivan Larsen,
Defendant and Appellant.

ORDER

Pursuant to Section 78-2-2(4), *Utah Code Annotated*, this matter is transferred to the Utah Court of Appeals for disposition. All further pleadings and correspondence should be directed to that court.

The address of the Utah Court of Appeals is:

Utah Court of Appeals
Office of the Clerk
450 S. State St.
PO Box 140230
Salt Lake City UT 84114-0230

FOR THE COURT:

March 1, 2004
Date

Pat Bartholomew
Clerk of Court

IN THE UTAH COURT OF APPEALS

---oo0oo---

State of Utah, Plaintiff and Appellee, v. Ivan Larsen, Defendant and Appellant.	ORDER Case No. 20031033-CA

This matter is before the court on its own motion to transfer the appeal pursuant to Rule 44 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the appeal is transferred to the Utah Supreme Court because the appeal relates to a conviction involving a first degree or capital felony. See Utah Code Ann. § 78-2a-3(2)(e)(2002).

Dated this 26th day of February, 2004.

FOR THE COURT:

Paulette Stagg,
Clerk of the Court

0317-083

Utah Court of Appeals

450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
TDD (801) 578-3940

March 4, 2004

K. ANDREW FITZGERALD
ATTORNEY AT LAW
55 E 100 S
MOAB UT 84532

RE: State v. Larsen Case No. 20031033-CA

Dear Mr. FITZGERALD

Please be advised that this case has been assigned to the Court of Appeals. Further proceedings will be handled by this court. Please note that the case number will remain the same as it was in the Supreme Court, with the exception that it will have a -CA after the number.

The Supreme Court file that accompanied the pourover indicates that you requested the transcript on January 12, 2004. Over thirty days have passed and the transcript has not been filed, nor has the court reporter filed a motion for an extension of time.

As the appellant's counsel and party requesting the transcript, it is your responsibility to ensure that the transcript is filed pursuant to Rules 11 and 12, Utah R. App. P. Please contact the court reporter and arrange for the transcript to be filed in the trial court.

If the court reporter is unable to file the transcript, the court reporter must file a motion for an extension of time. Pursuant to Rule 12(a), Utah R. App. P., the court reporter must seek the extension from the clerk of the appellate court. An extension request from a party to the appeal is improper.

Once the transcript has been filed and the trial court transmits a copy of the record index, a briefing schedule will be established and you will be notified.

ADDENDUM 2

Utah Constitution, Article 1 § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury o the county or district in which the offense is alleged to have been committed, and the right appeal in all cases.